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In the Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES D. BONANNO LINEN SERVICE, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD and TEAMSTERS LOCAL UNION NO 25, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board has reasonably determined that it would not effectuate the policies of the National Labor Relations Act to permit employers unilaterally to withdraw from multiemployer bargaining units solely because of an impasse in negotiations with the bargaining representative of the unit employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-37) is reported at 630 F.2d 25. The supplemental decision and order of the National Labor Relations Board (Pet. App. 38-52) is reported at 243 N.L.R.B. No. 140. The Board's original decision and order (Pet. App. 53-71) is reported at 229 N.L.R.B. 629.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1980. The petition for a writ of certiorari was filed on December 10, 1980, and granted on March 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the appendix, *infra*, pages 1a-3a.

STATEMENT

1. Petitioner, Charles D. Bonanno Linen Service, Inc., is a Massachusetts corporation engaged in the laundering, rental, and distribution of linen products. The truck drivers and helpers employed by petitioner, as well as by other linen supply companies in the area, are represented by Teamsters Local No. 25 ("the Union"). For the purposes of negotiating with the Union concerning the terms and conditions of employment of these workers, petitioner for several years has joined with nine of its competitors in a multiemployer unit called the New England Linen Supply Association ("the Association"). Bonanno was a signatory to the contract negotiated between the Association and the Union to cover the period from September 21, 1972 to April 18, 1975. (Pet. App. 54-55; A. 92-93.) On February 19, 1975, Bonanno authorized the Association's negotiating committee to represent it in the anticipated negotiations for a new contract, and Bonanno's president became a member of that committee. (Pet. App. 56; A. 23, 52, 106, 108.)

The Union and the Association held ten bargaining sessions in March and April of 1975. On April 30, a proposed contract was agreed upon by the negotiators, but was rejected by the Union members four days later. By May 15, the parties had reached an impasse over the issue of compensation: following the membership's rejection of the contract providing for payment of the drivers on an hourly basis, the Union demanded that the drivers be paid on a commission basis, while the Association insisted that they continue to receive payment at an hourly rate. (Pet. App. 56; A. 93-94.) When several subsequent meetings proved unsuccessful in breaking

the impasse, the Union, on June 23, initiated a selective strike against Bonanno. In response, the remaining Association members locked out their drivers. The stalemate continued throughout the summer, with the negotiators unable to agree upon a method of payment in meetings held in July, August, and September. (Pet. App. 56-57; A. 94.)

The Association's agreed strategy during the negotiations was both to resist the commission method of payment and to remain moderate in its hourly wage rate proposals. After the dispute continued into the fall, some members began to talk of changing this strategy by offering the Union a large wage increase, and two members met secretly with the Union.[1] The majority of the Association, including Bonanno, however, remained strongly opposed to any shift in strategy and were concerned that the separate meetings created a credibility problem for the Association. (A. 74-80.) Bonanno demanded and received from the Association members a pledge that there would be no more separate meetings with the Union. (A. 77-78).

On November 21, after it had hired permanent replacements for all of its striking drivers, Bonanno notified the Association by letter that it was "withdrawing from the association with specific respect to negotiations at this time because of an ongoing impasse with Teamsters Local 25" (Pet. App. 58; A. 94-95, 106).[2] Shortly thereafter, the Association terminated the lockout and informed the Union that it wished to continue negotia-

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[1] No separate agreements were made, and there is no evidence that these contacts even reached the level of attempted negotiation (Pet. App. 51, 57-58).

[2] On the same day, Bonanno mailed a copy of its revocation letter to the Union and read it by telephone to a Union representative. The Union representative made no comment other than to state that he would await the letter and probably consult the Union's attorney. (Pet. App. 58, 61; A. 28-29, 95, 106.)

tions on a multiemployer basis (Pet. App. 59; A. 95, 108-109).

Following Bonanno's attempted withdrawal, several negotiating sessions were conducted between December 1975 and April 1976 (Pet. App. 59-60; A. 95). On April 5, 1976, the Association submitted a substantially revised wage offer, but no agreement was reached (A. 53). On April 9, the Union filed unfair labor practice charges alleging that Bonanno unlawfully withdrew from the multiemployer unit on November 21 (Pet. App. 54; A. ii). On April 13, the Union abandoned its demand for payment by commission and accepted the Association's offer of a revised hourly wage rate. With this development, the parties quickly reached agreement on a new contract, dated April 23, 1976, and given retroactive effect to April 18, 1975. (Pet. App. 60; A. 95, 111-116.)

By letter dated April 29, 1976, the Union informed Bonanno that the Union had never consented to its withdrawal and therefore considered it to be bound by the settlement just reached. Bonanno denied it was bound by the contract in a reply letter dated May 3, 1976. (Pet. App. 60; A. 95-96, 117-118.)

2. The Board, adhering to its view that an impasse in bargaining negotiations is not an "unusual circumstance" that would permit unilateral withdrawal from a multiemployer bargaining unit after negotiations had commenced, concluded that Bonanno's attempt to withdraw from the multiemployer unit was untimely and thus ineffective. It therefore held that Bonanno violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)) by refusing to honor the collective bargaining agreement negotiated by the Association with the Union. (Pet. App. 38-51.) The Board ordered Bonanno, *inter alia*, to sign and implement the contract between the Association and the Union, and to give it retroactive effect to its effective date, making Bonanno's employees whole for any loss of pay or other employment benefits that they had suffered since that date (Pet. App. 52, 66).

3. The court of appeals held that "the Board has struck a reasonable balance in concluding that impasse alone does not justify unilateral withdrawal" from a multiemployer bargaining unit, for the contrary rule "unnecessarily increases the opportunities for the dissolution of such bargaining units and thereby undermines an effective tool of labor relations" (Pet. App. 36). The court therefore enforced the Board's order (Pet. App. 37).

SUMMARY OF ARGUMENT

I

In *NLRB* v. *Truck Drivers Local Union No. 449 (Buffalo Linen)*, 353 U.S. 87 (1957), this Court held that Congress, in enacting the 1947 Taft-Hartley amendments to the Act, recognized that multiemployer bargaining "was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining," and " 'intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future' " (*id.* at 95-96). In *Retail Associates, Inc.*, 120 N.L.R.B. 384 (1958), the Board announced new rules governing withdrawal from a multiemployer bargaining unit. Under these rules, an employer or a union is free to withdraw from the multiemployer unit for any reason before the date on which negotiations actually commence, provided adequate notice is given. Once negotiations for a contract have begun, however, a party may withdraw only if "mutual consent" is given or if "unusual circumstances" exist.

By allowing unlimited withdrawals from the unit prior to the start of negotiations, the *Retail Associates* rules accommodate the legitimate interest of both individual employers and their represented employees in retaining (or reclaiming) direct control over their own labor relations. At the same time, they avoid the impairment of the public and private objectives of multiemployer bargaining that would occur if the parties

were free to withdraw from the unit at will once bargaining has begun.

A reasonable stability in the employer complement is essential since "'[t]he parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining.'" *Hess Oil & Chemical Corp.* v. *NLRB*, 415 F.2d 440, 444 (5th Cir. 1969), cert. denied, 397 U.S. 916 (1970). Moreover, "[a] shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process." *NLRB* v. *Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967). Finally, permitting withdrawal at will during bargaining would deprive employers, unions, and employees of any fair and predictable means for determining the continued legitimacy of the employees' bargaining representative.

II

The Board has reasonably concluded that a bargaining impasse is not an "unusual circumstance" that justifies an untimely withdrawal from a multiemployer bargaining unit.

An impasse in negotiations "cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations." *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22, 23 (1973). It is "only a temporary 'deadlock' or 'hiatus' in negotiations which in almost all cases is eventually broken either through a change of mind or the application of economic force" (Pet. App. 41).

Furthermore, the problem of deciding whether the parties have reached impasse "is often difficult for the bargainers and is necessarily so for the Board." *Dallas General Drivers, Local Union No. 745* v. *NLRB*, 355 F.2d 842, 844 (D.C. Cir. 1966). Moreover, if withdrawal were permitted at impasse, the parties would bargain under the threat of withdrawals by those who were not completely satisfied with the results of the negotiations. This would permit the scope of the unit to be used as

a "bargaining lever"—a result that is contrary to sound principles consistently approved in the multiemployer context.

Finally, it is precisely at and during impasse—when bargaining is temporarily replaced by economic warfare—that the parties' need for a stable, predictable bargaining unit is most acute. The partial or complete destruction of the multiemployer unit by unlimited unilateral withdrawals at or during impasse would tend to unsettle any tentative agreements or mutually dependent compromises that may have been reached in prior bargaining, and also would be unfair to the other parties who had applied or withstood economic pressure in support of the unit-wide bargaining demands.

III

The possibility that a union might enter into interim agreements with individual employers during a strike does not warrant a rule permitting employers unilaterally to withdraw from a multiemployer unit at impasse.

Initially, even if some right of withdrawal were necessary to counter-balance the union's ability to negotiate interim agreements, there would be little reason to link it to the existence of an impasse. Because employers may lock out employees and employees may strike prior to impasse, interim settlement of these economic conflicts are often reached prior to impasse.

In any event, interim agreements of the kind the Board has approved are not the equivalent of unilateral withdrawal from a multiemployer unit. The Board has approved interim agreements only in situations where employees work during the strike either under the terms of the expired contract, or under the terms that the union had previously offered to the employers' association and the association had rejected. In either case, the parties mutually recognize that these terms are temporary, pending the outcome of the group bargaining, and that any contract reached in the multiemployer unit

will ultimately govern all employer-employee relationships in that unit. Such agreements are in sharp contrast to final separate agreements with members of the multiemployer unit.

To be sure, interim agreements, like the selective strike—of which they are an integral part—may create a whipsaw pressure on the remaining employers to agree to the union's demands within the unit. However, "the uneven application of economic pressure *per se* is not inconsistent with multiemployer bargaining" (Pet. App. 33). The whipsaw pressure on the remaining members of an employer association from interim agreements is analytically no different from the pressure that results when some members refuse to join in a lockout in response to a selective strike.

ARGUMENT

THE BOARD HAS REASONABLY DETERMINED THAT IT WOULD NOT EFFECTUATE THE POLICIES OF THE ACT TO PERMIT AN EMPLOYER UNILATERALLY TO WITHDRAW FROM A MULTIEMPLOYER BARGAINING UNIT SOLELY BECAUSE OF AN IMPASSE IN NEGOTIATIONS WITH THE BARGAINING REPRESENTATIVE OF THE UNIT EMPLOYEES

Multiemployer bargaining is a consensual arrangement in which a group of employers agrees unequivocally to be bound by group action in collective bargaining negotiations, and a union (or group of unions) agrees to bargain with the employers' designated representative for a bargaining unit composed of employees of all the employers.[3] The practice of multiemployer bargaining was approved by the Board early in its administration

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[3] *NLRB* v. *Hart*, 453 F.2d 215, 217-218 (9th Cir. 1971), cert. denied, 409 U.S. 844 (1972); *Komatz Construction, Inc.* v. *NLRB*, 458 F.2d 317, 321 (8th Cir. 1972); *McAx Sign Co.* v. *NLRB*, 576 F.2d 62, 66 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979).

of the National Labor Relations Act,[4] and a large number of employers and unions currently elect to use this procedure[5] as the means of satisfying their mutual obligations to bargain in good faith.[6]

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[4] *Shipowners' Ass'n of the Pacific Coast*, 7 N.L.R.B. 1002, 1024-1025 (1938), appeal dismissed on other grounds *sub nom. AFL* v. *NLRB*, 103 F.2d 933 (D.C. Cir. 1939), aff'd, 308 U.S. 401 (1940); *Waterfront Employers Ass'n of the Pacific Coast*, 71 N.L.R.B. 80, 109-111 (1946).

[5] A recent survey of major collective bargaining agreements—those covering 1,000 or more employees—found that of 1,536 major agreements, 648 (42%) were multiemployer agreements and that 3,238,400 employees were covered by these agreements. U.S. Bureau of Labor Statistics, Dept. of Labor, Bull. No. 2065, *Characteristics of Major Collective Bargaining Agreements—January 1, 1978*, at 12, table 1.8 (1980).

[6] Section 8(d) of the Act, 29 U.S.C. 158(d) states, in relevant part:

> [T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, * * * and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), declares it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 8(b)(3), 29 U.S.C. 158(b)(3), likewise declares it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)." Section 9(a), 29 U.S.C. 159(a), in turn, specifies that "[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *." Finally, under Section 2(2), 29 U.S.C. 152(2), the term "employer" includes "any person acting as an agent of an employer, directly or indirectly," and the term

Prior to the passage of the Taft-Hartley amendments in 1947 (61 Stat. 136), Congress carefully reviewed the practice of multiemployer bargaining. It declined to enact legislation that would have limited or outlawed this practice, because it concluded that in many industries the practice is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining" (*NLRB* v. *Truck Drivers Local Union No. 449* (*Buffalo Linen*), 353 U.S. 87, 95-96 (1957)).[7] Congress evidently intended " 'that the Board should continue its established administrative

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"person" is defined in Section 2(1), 29 U.S.C. 152(1), to include "associations."

[7] By joining multiemployer bargaining units, smaller employers are able to bargain on an equal basis with a large union, and to avoid "the competitive disadvantages resulting from nonuniform contractual terms." *Buffalo Linen*, *supra*, 353 U.S. at 96. In such bargaining, employers can make concessions without fear that other employers will refuse to make similar concessions and thus achieve a competitive advantage; likewise, a union can make concessions without fear that the employees will be dissatisfied with not receiving the same benefits which the union might win from other employers. Thus, multiemployer bargaining encourages both employers and unions to offer reasonable concessions and to reach agreement without industrial strife. See R. Randall, *Labor Relations in the Pulp and Paper Industry of the Pacific Northwest* 102-103 (1942); S. Rep. No. 105 (Pt. 2), 80th Cong., 1st Sess. 7 (1947); H.R. Rep. No. 245, 80th Cong., 1st Sess. 86-88 (1947); 93 Cong. Rec. 4674 (Sen. Knowland), 4574-4575 (Sen. Kilgore), 1834-1844 (Sen. Morse) (1947); General Subcomm. on Labor, of the House Comm. on Education and Labor, 88th Cong., 2d Sess. *Multi-Employer Association Bargaining and its Impact on the Collective Bargaining Process* 12-13 (1964). Moreover, multiemployer bargaining facilitates the development of industry-wide programs benefiting employees, such as pension funds, health insurance plans, apprenticeship or retraining course, and hiring halls. Absent multiemployer bargaining, many employers would be unable to offer such benefits, either because the employer employs too few employees or because employees are too transient to allow efficient operation of such programs. See Multiemployer Pension Plan

practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future.' " 353 at 96, quoting *Truck Drivers Local Union No. 449* v. *NLRB*, 231 F.2d 110, 121 (2d Cir. 1956) (dissenting opinion).[8]

One of the recurring questions in multiemployer bargaining concerns the respective rights and obligations of the parties when some but not all of the parties wish to end their consensual relationship. Following this Court's recognition in *Buffalo Linen* that it is a policy of the Act to preserve the integrity of multiemployer bargaining units, the Board, in *Retail Associates, Inc.*, 120 N.L.R.B. 384 (1958), sought to provide guidance to the participants in multiemployer bargaining and announced new ground rules for withdrawal that it intended to apply in future cases. Under these rules, an employer or union is free to withdraw from the multiemployer unit for any reason before the date set for renegotiation of an existing contract or the date on which negotiations actually commence, provided adequate notice is given. Once negotiations for a new contract have begun, however, a party may withdraw only if "mutual consent"

Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, to be codified at 29 U.S.C. 1001a; H.R. Rep. No. 96-869 (Pt. I), 96th Cong., 2d Sess. 51-54, 65 (1980); *Multi-Employer Association Bargaining and its Impact on the Collective Bargaining Process*, *supra*, at 15; U.S. Dep't of Labor, *Multi-Employer Pension Plans Under Collective Bargaining* 1 (1960).

[8] In *Buffalo Linen*, the Court upheld the Board's conclusion that "a temporary lockout may lawfully be used as a defense to a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis" (353 U.S. at 93). See also *NLRB* v. *Brown*, 380 U.S. 278 (1965) (employers who locked out to defend the multiemployer unit against a whipsaw strike may lawfully resume operations with temporary replacements when the struck employer has also done so).

is given or if "unusual circumstances" exist. *Id.* at 395.[9]

Although the *Retail Associates* rules are now well accepted,[10] the courts of appeals have divided over the

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[9] Prior to the development of its *Retail Associates* rules, the Board permitted employers to abandon a multiemployer unit in the midst of bargaining (*e.g., Bearing & Rim Supply Co.*, 107 N.L.R.B. 101, 102-103 (1953); *Stamford Wall Paper*, 92 N.L.R.B. 1173 (1951)). And in *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409, 413, 416-418 (1950), enforced in part on other grounds, 190 F.2d 576, 581-582 (7th Cir. 1951), the Board, in an effort to reduce "the existing disparity between the treatment accorded employers and unions," held that a union could withdraw from a multiemployer unit at impasse (*id.* at 418). On review of *Morand Bros. Beverage*, the Seventh Circuit specifically declined to "indorse the Board's reasoning to the effect that, once negotiations have been stalemated, a union may utterly disregard the employer unit with which it has theretofore bargained and proceed to fashion a new unit for bargaining purposes * * *." 190 F.2d at 582. Thereafter, through other cases raising the issue of the legitimacy of the lockout in multiemployer bargaining (see *Buffalo Linen, supra*, 353 U.S. at 89 n.5), the Board came to recognize the need for greater stability in multiemployer bargaining. It concluded that the attempted abandonment of a multiemployer unit by an employer and his employees because of dissatisfaction with the results of group bargaining was inconsistent with the commitment to be bound by the results of such bargaining (*McAnary & Welter, Inc.*, 115 N.L.R.B. 1029, 1031-1032 (1956)), and, in *Retail Associates*, it refused to approve a union's mid-negotiation withdrawal from a multiemployer unit in an effort to defeat the Association's petition for an election in that unit, reasoning that "the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that withdrawal will be permitted from an established multiemployer bargaining unit" (120 N.L.R.B. at 393).

The Board's increasing emphasis on the stability of multiemployer units was paralleled by its development of a new policy favoring stability in industrial units and restricting the right of craft employees to withdraw from such units. See *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387, 391-398 (1966), overruling *American Potash & Chemical Corp.*, 107 N.L.R.B. 1418, 1420-1424 (1954).

[10] See, *e.g., Carvel Co.* v. *NLRB*, 560 F.2d 1030 (1st Cir. 1977), cert. denied, 434 U.S. 1065 (1978); *NLRB* v. *John J. Corbett Press*,

question whether a bargaining impasse is an "unusual circumstance" that justifies an employer or a union in unilaterally withdrawing from a multiemployer bargaining unit.[11] In light of the considerations that underlie

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Inc., 401 F.2d 673 (2d Cir. 1968); *NLRB* v. *Dover Tavern Owners Ass'n*, 412 F.2d 725 (3d Cir. 1969); *NLRB* v. *Marine Machine Works, Inc.*, 635 F.2d 522 (5th Cir. 1981); *NLRB* v. *Central Plumbing Co.*, 492 F.2d 1252 (6th Cir. 1974); *NLRB* v. *Custom Wood Specialties, Inc.*, 622 F.2d 381 (8th Cir. 1980); *NLRB* v. *Brotherhood of Teamsters, Local No. 70*, 470 F.2d 509 (9th Cir. 1972), cert. denied, 414 U.S. 821 (1973); *NLRB* v. *Johnson Sheet Metal, Inc.*, 442 F.2d 1056 (10th Cir. 1971).

[11] Since the Board first decided the issue in *Hi-Way Billboards, Inc.*, 206 N.L.R.B. 22 (1973), enforcement denied, 500 F.2d 181 (5th Cir. 1974), four circuit courts of appeals have rejected the Board's position that a bargaining impasse is not an unusual circumstance under the *Retail Associates* rules: *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir.), cert. denied, 423 U.S. 893 (1975) (dictum); *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975); *NLRB* v. *Independent Ass'n of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979).

Following the Board's reconsideration and clarification of its position in the present case (Pet. App. 38-51), however, its position has been approved not only by the First Circuit (Pet. App. 18-37), but also by the Fifth Circuit (*NLRB* v. *Marine Machine Works, Inc.*, *supra*, 635 F.2d at 524-526), which has now reconsidered its decision in *Hi-Way Billboards*, *supra*. The Ninth Circuit, by contrast, adheres to *Associated Shower Door*, *supra*, and to the Third Circuit's decision in *Beck Engraving*, *supra*. See *H & D, Inc.* v. *NLRB*, 105 L.R.R.M. 3070 (9th Cir. 1980), petition for cert. pending, No. 80-1498 (filed Mar. 4, 1981).

Contrary to petitioner, *Fairmont Foods Co.* v. *NLRB*, 471 F.2d 1170, 1172 (8th Cir. 1972), was decided before *Hi-Way Billboards, Inc.*, *supra*, and, accordingly, did not pass upon "the Board's rejection of impasse as an 'unusual circumstance'" (Pet. Br. 16). The language quoted by petitioner (Br. 16-17) is "dicta * * * [that] relied primarily on what this court perceived to be the Board's policy and in view of the change of this policy, *Fairmont* can no longer be considered controlling in this circuit." *Tobey Fine Papers of Kansas City* v. *NLRB*, 107 L.R.R.M. 2221, 2222 n.3 (8th Cir. 1981).

the *Retail Associates* rules, we submit that the Board reasonably has concluded that a bargaining impasse is not such a circumstance.

A. The Board's *Retail Associates* Rules Reflect a Reasoned Balance of the Public and Private Interests in Multiemployer Bargaining

The Board's *Retail Associates* rules allow unlimited withdrawals from multiemployer bargaining units prior to the commencement of negotiations, but prohibit withdrawals from the unit once bargaining has begun in the absence of mutual consent or unusual circumstances. They reflect a reasoned exercise of the Board's authority under Section 9 of the Act to define appropriate bargaining units, and its authority under Section 8 of the Act to enforce the duty to bargain, because they help to effectuate the statutory policy of promoting industrial peace through collective bargaining.[12] Those rules fairly promote the public and private interests in multiemployer bargaining and are consistent with the objectives of Congress in sanctioning the continued practice of multiemployer bargaining.

Thus, by allowing unlimited withdrawals from the unit prior to the start of negotiations, the *Retail Asso-*

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[12] Section 9(b) of the Act, 29 U.S.C. 159(b), directs the Board to decide "in each case * * * the unit appropriate for the purposes of collective bargaining" and obliges the Board to consider, among other factors, "the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining" and whether the unit implements the Act's "policy of efficient collective bargaining." *Pittsburgh Plate Glass Co.* v. *NLRB*, 313 U.S. 146, 156, 165 (1941). Sections 8(a)(5) and 8(b)(3) authorize the Board "to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." *NLRB* v. *Katz*, 369 U.S. 736, 747 (1962). The Board is likewise authorized, pursuant to Section 8(d) and Section 10(c), 29 U.S.C. 158(d) and 160(c), to order employers or unions to sign and honor collective agreements that have been negotiated on their behalf. *NLRB* v. *Strong*, 393 U.S. 357 (1969).

ciates rules accommodate the legitimate interest of both individual employers and their represented employees in retaining (or reclaiming) direct control over their own labor relations. History has demonstrated that, even in longstanding multiemployer relationships, parties may come and go in response to changed industrial circumstances,[13] and that the desire for individual control over vital issues in the employment relationship may be strongly felt.[14] As a practical matter, the failure to provide an outlet for the dissatisfactions that may arise in a multiemployer bargaining relationship would very likely retard the practice of bargaining on this basis, since employers and unions alike "would understandably be reluctant to initiate multiemployer bargaining if the decision to do so were virtually irrevocable." *The Evening News Association*, 154 N.L.R.B. 1494, 1499 (1965), enforced *sub nom. Detroit Newspaper Publishers Ass'n* v. *NLRB*, 372 F.2d 569 (6th Cir. 1967).

Moreover, providing such an outlet gives due recognition to the fact that, in approving the practice of multiemployer bargaining, Congress indicated its approval of the Board's view that multiemployer bargaining rests on a foundation of mutual consent.[15] Further, Congress

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[13] See, *e.g.*, *Pacific Coast Ass'n of Pulp & Paper Mfrs.*, 163 N.L.R.B. 892, 893, 895-896 (1967) (reviewing the 30-year history of a multiemployer bargaining relationship, and, in view of the history of employer withdrawals, permitting a union to withdraw, prior to the commencement of negotiations, with respect to some but not all of the unit employers, subject to the reciprocal right of any or all of the remaining employers to effect a timely withdrawal).

[14] See, *e.g.*, *Pacific Coast Ass'n of Pulp & Paper Mfrs.* v. *NLRB*, 304 F.2d 760, 762-763 (9th Cir. 1962) (employer refusal to bargain about pension issues on a multiemployer basis); *Pacific Coast Ass'n of Pulp & Paper Mfrs.*, *supra*, 163 N.L.R.B. at 894 (several local unions sought a timely withdrawal because of "special problems * * * that have not been given proper attention in the multiemployer unit").

[15] H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 31-32 (1947); S. Rep. No. 105 (Pt. 1), 80th Cong., 1st Sess. 18 (1947).

affirmatively sought to strengthen the voluntary nature of multiemployer bargaining by enacting new measures proscribing union tactics designed to coerce employers to enter into or withdraw from multiemployer bargaining.[16]

On the other hand, the objectives of multiemployer bargaining would be frustrated if the parties were free to withdraw from the unit at will once bargaining has begun. A number of considerations support this conclusion.

First, a reasonable stability in the employer complement is essential since "[t]he parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining." [17] Bargaining issues typically present a range of choices that may be differently assessed depending on the particular interests of the employers and employees in the bargaining unit.[18] Who is in the bargaining unit shapes

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[16] Section 8(b)(1)(B) of the Act, 29 U.S.C. 158(b)(1)(B), declared it an unfair labor practice for a labor organization "to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." In enacting this measure, "[t]he specific concern of Congress was to prevent unions from trying to force employers into or out of multi-employer bargaining units" *Florida Power & Light Co.* v. *Electrical Workers*, 417 U.S. 790, 803 (1974). See S. Rep. No. 105 (Pt. 1), 80th Cong., 1st Sess. 21 (1947). Further, the secondary boycott provisions proscribe strikes and other coercive conduct by unions where "an object thereof is: (A) forcing or requiring any employer * * * to join any * * * employer organization * * *." Section 8(b)(4)(A) of the Act, 29 U.S.C. 158(b)(4)(A); H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 44-45 (1947).

[17] *Hess Oil & Chemical Corp.* v. *NLRB*, 415 F.2d 440, 449 (5th Cir. 1969), cert. denied, 397 U.S. 916 (1970), quoting from *Douds* v. *Int'l Longshoremen's Ass'n*, 241 F.2d 278, 282 (2d Cir. 1957).

[18] *E.g.*, whether economic gains should be received in the form of higher wages, shorter hours or increased fringe benefits (*NLRB* v. *Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224 (1949)); how seniority should be computed and to what privileges it should attach (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338-339 (1953));

not only the issues that are brought to the bargaining table,[19] but also the nature of the concessions or compromises that each side feels obligated to make in order to secure an agreement.[20] The process of bargaining—weighing the advantages and disadvantages of differing proposals, determining (and redetermining) priorities, and ultimately fashioning a contract package that is acceptable to the principals on both sides—is complex. In multiemployer bargaining that process could become unduly complex, if not futile, unless both sides have assurance that the unit will remain relatively stable during bargaining.

Second, if parties could withdraw from multiemployer units at will after bargaining has commenced, multiemployer bargaining could not serve the objective that Congress intended to achieve—namely, "promoting industrial peace through strengthened collective bargaining." *Buffalo Linen, supra*, 353 U.S. at 95. Negating the reasons which prompt multiemployer bargaining (see note 7, *supra*), such withdrawals would tend to revive fears of competitive disadvantage resulting from differences in wages and working conditions; to imperil tentative agreements already reached in the unit and to impede further bargaining within the unit; to multiply the number of

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whether an increased right to accumulate unused sick leave counterbalances a reduction in the amount of new leave earned each year (*NLRB* v. *Katz, supra*, 369 U.S. at 744).

[19] *E.g., Anderson Lithograph Co.*, 124 N.L.R.B. 920, 923 (1959), enforced *sub nom. NLRB* v. *Jeffries Banknote Co.*, 281 F.2d 893 (9th Cir. 1960) (union's demand for a profit sharing plan was prompted by a particular employer's joining the multiemployer unit).

[20] For example, if some members of an employers' association oppose a concession on an issue of importance to the union, while other members are relatively indifferent, and the association makes this fact known, the union may be encouraged to weaken or trade off some of its other demands in the hope of securing a favorable agreement on this issue. Cf. *Retail Clerks Union, No. 1550* v. *NLRB*, 330 F.2d 210, 215 (D.C. Cir. 1964).

disputes and to retard their peaceful resolution; and, without fair warning, to remove the shelter of multiemployer bargaining from small vulnerable employers who may have been lulled into believing they could rely on each others' strength. In short, "[a] shift in membership after negotiations have begun has lively possibilities for disrupting the bargaining process," and "the potential for disruption is sufficient to justify the Board in adopting a uniform rule for all cases that withdrawal is not timely once bargaining has begun." *NLRB* v. *Sheridan Creations, Inc.*, 357 F.2d 245, 248 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967).

Third, permitting withdrawal at will during bargaining would deprive employers, unions, and employees of any fair and certain means for determining the continued legitimacy of the employees' bargaining representative. Under the Board's *Retail Associates* rules, unions, employers, and employees all know with certainty that, once multiemployer bargaining has commenced, the relevant unit for testing the union's majority status, absent unusual circumstances, is the multiemployer unit.[21] By contrast, if employers and unions could withdraw from a multiemployer unit at will during contract negotiations, the boundaries of the multiemployer unit could change from day to day, and neither side would know in advance whether the relevant measure of employee support was an employer unit or the multiemployer unit.[22]

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[21] See *Sheridan Creations, Inc.*, 148 N.L.R.B. 1503, 1505, 1506 (1964), enforced, 357 F.2d 245 (2d Cir. 1966), cert. denied, 385 U.S. 1005 (1967).

[22] Both unions and employers engaged in multiemployer bargaining sometimes seek a momentary tactical advantage by having employee support measured in other than the multiemployer unit. Compare *Retail Associates, supra*, 120 N.L.R.B. at 390-394; *Taylor Motors, Inc.*, 241 N.L.R.B. 711 (1979) (unions bargaining for a multiemployer contract opposed decertification election in the multiemployer unit), with *NLRB* v. *Custom Wood Specialties, Inc., supra*, 622 F.2d at 384-385; *Tobey Fine Papers of Kansas City* v. *NLRB*,

Finally, restricting the withdrawal rights of employers and unions is necessary in order that both sides can be assured of receiving the benefits of the consensual arrangement they freely elected. Neither employers nor unions may insist that the other commence bargaining on a multiemployer basis, and each side has an unlimited right to withdraw from a multiemployer unit before bargaining begins (*supra*, pages 14-16). This freedom afforded the parties supports a rule that, once an unequivocal commitment to be bound by group bargaining is made, it should ordinarily be honored. Otherwise, the legitimate expectations on both sides may be frustrated as one side or the other reneges on its pledge because of disenchantment with the results of bargaining. Collective bargaining is inherently a process where "[t]he complete satisfaction of all who are represented is hardly to be expected" (*Ford Motor Co.* v. *Huffman*, *supra*, 345 U.S. at 338), and parties who voluntarily seek the advantages of group bargaining are reasonably held to assume the ordinary responsibilities and limitations that go with it. *NLRB* v. *Tulsa Sheet Metal Works, Inc.*, 367 F.2d 55, 58 (10th Cir. 1966).

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supra, 107 L.R.R.M. at 2225 (employers bargaining for a multiemployer contract attempted untimely withdrawal in response to decertification activity by the employees of an individual employer in the unit). The Act, however, "is not intended to serve either party's individual interest, but to foster in a neutral manner a system in which the conflict between these interests may be resolved" (*First National Maintenance Corp.* v. *NLRB*, No. 80-544 (June 22, 1981), slip op. 14), and the Board measures both sides' representation claims by the same neutral standard—that of the multiemployer unit. Such a rule is fair to the employees as well, since they receive the benefits of stable labor relations and effective collective bargaining that Congress believed flowed from multiemployer units, and these benefits would be imperiled for all if dissatisfied subgroups within a unit were free to withdraw unilaterally in the midst of bargaining. See, *e.g.*, *NLRB* v. *Brotherhood of Teamsters Local 70*, *supra*, 470 F.2d at 509-510.

B. The Board Has Reasonably Concluded That a Bargaining Impasse Is Not an Exceptional Circumstance Privileging a Unilateral Withdrawal From Multiemployer Bargaining

The Board's *Retail Associates* rules are not inflexible. The rules expressly contemplate that otherwise untimely withdrawals from a multiemployer unit may be excused by "mutual consent" (120 N.L.R.B. at 395).[23] Further, the rules indicate that, even in the absence of the requisite consent, a unilateral withdrawal may be excused if there are "unusual circumstances" (*ibid.*). The Board has found "unusual circumstances" excusing withdrawal where extreme financial pressures, such as impending bankruptcy, threatened an employer's survival.[24] Unilateral employer withdrawal has also been permitted—on the grounds of "unit fragmentation"—in circumstances where the size of the bargaining unit has been drastically reduced as the result of untimely withdrawals to which the union consented[25] or where a union has engaged in a course of conduct that manifested either a clear purpose to destroy the multiemployer unit or an abandonment of multiemployer bargaining.[26] The Board, however, has refused to find that a bargaining impasse is in itself a circumstance that justifies an untimely withdrawal from bargaining; the Board has reasonably con-

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[23] The Administrative Law Judge (Pet. App. 60-62), the Board (Pet. App. 40, 51, 70-71), and the court below (Pet. App. 36-37) found that there was no such consent here, and petitioner does not dispute that finding in this Court.

[24] *United States Lingerie Corp.*, 170 N.L.R.B. 750, 751 (1968); *Spun-Jee Corp.*, 171 N.L.R.B. 557, 558 (1968); *Atlas Electrical Service Co.*, 176 N.L.R.B. 827, 830 (1969).

[25] *NLRB* v. *Southwestern Colorado Contractors Ass'n*, 447 F.2d 968, 969-970 (10th Cir. 1971); *Connell Typesetting Co.*, 212 *N.L.R.B.* 918, 921 (1974).

[26] *Typographic Service Co.*, 238 N.L.R.B. 1565 (1978); *Neville Foundry Company, Inc.*, 122 N.L.R.B. 1187, 1189-1190 (1959).

cluded that the balance of the considerations discussed above does not shift at the time of impasse.

1. An impasse in negotiations occurs when parties reach "deadlock" with "neither party willing to move from its respective position" (*Hi-Way Billboard, Inc., supra*, 206 N.L.R.B. at 23). This occurrence "cannot be said to be an unexpected, unforeseen, or unusual event in the process of negotiations" (*ibid.*). "The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest" (*NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 488 (1960)). The Act is predicated on the theory that "free opportunity for negotiation * * * is likely to promote industrial peace and may bring about * * * agreements" (*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937)), but it requires only that the parties bargain in good faith about terms and conditions of employment (29 U.S.C. 158(d)).

Employers and unions who agree to bargain in a multiemployer unit may reasonably be held to assume the risk of a bargaining impasse, which is part of the normal process of attempting to reach an agreement in collective bargaining. Indeed, many mediators have contended that it is only at the point of impasse—when the parties have exhausted their own efforts to reach agreement—that the intervention of outside mediators is appropriate.[27] Despite the existence of an impasse, a sense of the inevitability of eventual settlement underlies almost all

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[27] See W. Maggiolo, *Techniques of Mediation in Labor Disputes* 14-15 (1971); K. Braun, *Labor Disputes and Their Settlement* 110-111 (1973). Even mediators who would intervene earlier recognize that the suspension of negotiations at impasse is often necessary in order to permit the parties to cool off, and they will themselves suggest that the parties recess. See W. E. Simkin, *Mediation and the Dynamics of Collective Bargaining* 79 (1971).

collective bargaining negotiations.[28] As the Board stated here (Pet. App. 41):

> An impasse is only a temporary "deadlock" or "hiatus" in negotiations which in almost all cases is eventually broken, either through a change of mind or the application of economic force. * * * Suspension of the process as a result of an impasse may provide time for reflection and a cooling of tempers; it may be used to demonstrate the depth of a party's commitment to a position taken in the bargaining; or it may increase economic pressure on one or both sides, and thus increase the desire for agreement. For example, impasse permits the employer to place into effect those wage increases or benefits it has heretofore offered [see note 30, *infra*], an action (or the possibility of it) which may substantially shift the bargaining positions of the parties. In these and other possible uses of impasse as a bargaining tactic, the emphasis is toward achieving agreement rather than causing a permanent disruption of the relation.

The occurrence of an impasse can thus scarcely be considered an "unusual circumstance" similar to those the Board has found sufficient to excuse an untimely withdrawal from the multiemployer unit.[29]

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[28] Simkin, *supra*, at 158-159. "Even when negotiations are in the doldrums and no progress is being made, everybody is aware that this must be temporary. After an unusually frustrating day, a frequent mediator observation is: 'Oh, well, at least we're one day closer to a settlement'" (*id.* at 159).

[29] For this reason, petitioner is incorrect in asserting that the refusal to recognize a right of withdrawal on impasse requires "adherence to a multiemployer unit long after meaningful collective bargaining within that framework has become nothing more than an exercise in futility" (Br. 35). See also Amicus Curiae Graphic Arts Union Employers of America Br. 11-15. Moreover, fragmentation of a unit merely because of frustration over the conduct of particular negotiations disserves other interests furthered by multiemployer bargaining (see note 7, *supra*).

2. Indeed, the practicalities of bargaining show that impasse should not be held to justify such withdrawal.[30]

a. The problem of deciding whether the parties have reached impasse "is often difficult for the bargainers and is necessarily so for the Board." *Dallas General Drivers, Local Union No. 745* v. *NLRB*, 355 F. 2d 842, 844 (D.C. Cir. 1966); see Amicus Curiae United Mine Workers of America Brief at 11-13. Impasse may be reached quickly or after extended negotiations.[31] It may persist for a

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[30] In the context of single-employer bargaining, neither the Board nor the courts have ever held that impasse was a circumstance justifying similar fundamental changes in the bargaining relationship, although it does signal certain changes in the parties' bargaining obligation. When such a deadlock is reached, the duty to meet and bargain about the subject matter of the impasse is suspended until such time as there is a reasonable basis to believe that an agreement might be possible. See, *e.g.*, *NLRB* v. *Webb Furniture Corp.*, 366 F.2d 314, 315-316 (4th Cir. 1966); *Transport Company of Texas*, 175 N.L.R.B. 763, 767-768 (1969), enforced, 438 F.2d 258 (5th Cir. 1971). Further, once impasse results, the employer, having satisfied its bargaining obligation with respect to the subjects of the impasse, is free unilaterally to implement the terms and conditions it previously proposed to the union. See, *e.g.*, *American Fed'n of Television & Radio Artists* v. *NLRB*, 395 F.2d 622, 624 (D.C. Cir. 1968); *Bi-Rite Foods*, 147 N.L.R.B. 59, 64-65 (1964). Impasse also defines the limits to which either side may press discussion of nonmandatory subjects of bargaining. See *NLRB* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

[31] *E.g.*, *Dalton Brick & Tile Corp.*, 126 N.L.R.B. 473, 478-480 (1960), enforcement denied on other grounds, 301 F.2d 886 (5th Cir. 1962) (impasse after two meetings; agreement reached two months later, following a lockout by the employer); *Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), aff'd *sub nom. American Fed'n of Television & Radio Artists* v. *NLRB*, 395 F.2d 622 (D.C. Cir. 1968) (impasse reached after some 25 negotiating sessions held over a six-month period; employee strike settled some six months later); *NLRB* v. *Hi-Way Billboards, Inc.*, 473 F.2d 649, 651-652, 655 (5th Cir. 1973) (impasse reached after 13 meetings in a two-month period; following an employee strike, agreement reached within two weeks).

considerable period and then break suddenly, surprising even the participants.[32]

b. Moreover, if withdrawal were permitted at impasse, the parties would bargain under the threat of withdrawals by those who were not completely satisfied with the results of the negotiations.[33] Such a rule would thus invite the parties to use the scope of the unit as a "bargaining lever"—a result that is contrary to sound principles consistently approved in the multiemployer context.[34]

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[32] See, *e.g.*, *Bill Cook Buick*, 224 N.L.R.B. 1094, 1095 (1976) (after five months without movement on the major issues, notwithstanding a three-month strike, both sides made concessions and quickly reached agreement). See also J. Carpenter, *Employers' Associations and Collective Bargaining in New York City* 208-209 (1950):

> Major strikes * * * become a battle of resources for the union as well as the associations. * * * More than one association * * * has discovered to its surprise [after yielding] that if its members had held together a few days longer, the association would have broken the back of union resistance.

Similar experience underlies the admonition (B. Morse, *How to Negotiate the Labor Agreement* 63 (1974)) that a negotiator should never make a concession without first checking whether the other side has not itself decided to yield the issue.

[33] Cf. *NLRB* v. *Independent Ass'n of Steel Fabricators*, *supra*, 582 F.2d at 146-147, where the court found that, because the union refused to yield the advantages it had gained in previous bargaining, thereby disappointing the expectations of the employers in the multiemployer unit, "the Association was useless as a bargaining device." The court accordingly permitted untimely withdrawal from the unit.

[34] *NLRB* v. *Sheridan Creations, Inc.*, *supra*, 357 F.2d at 248; *NLRB* v. *Johnson Sheet Metal, Inc.*, *supra*, 442 F.2d at 1059; *McAx Sign Co.* v. *NLRB*, *supra*, 576 F.2d at 67-68; *Carvel Co.* v. *NLRB*, *supra*, 560 F.2d at 1033. The bargaining unit is the framework for mandatory bargaining; normally, it is not itself a subject of mandatory bargaining, and a threat unilaterally to alter the boundaries of a multiemployer unit during bargaining (and thereby to inhibit or obstruct the process of bargaining) is an impermissible tactic. See *Newspaper Printing Corp.* v. *NLRB*, 625 F.2d 956, 963

Indeed, given the typical pattern of bargaining, such a rule would provide a device whereby the parties could realistically hope to get the best of both worlds: an agreement in the multiemployer unit if satisfied with its terms, and an opportunity to escape the unit entirely if it appeared that the agreement would be less favorable than expected. Experienced negotiators typically take firm positions at the outset in order to test the limits of their opponent's position, and "[t]o this end, compromises are usually made cautiously and late in the process." [35] Simply by refraining from making a concession, either side could precipitate an impasse and escape from the unit.[36]

c. It is precisely at and during impasse—when bargaining is temporarily replaced by economic warfare—that the parties' need for a stable, predictable bargaining unit is most acute. Before impasse, parties involved in multiemployer bargaining ordinarily will have made concessions, reached some tentative agreements, and possibly resorted to various economic weapons or weathered the other parties' use of such weapons.[37] In taking such ac-

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(10th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co.* v. *NLRB*, 602 F.2d 73, 76 (4th Cir. 1979); *General Drivers & Helpers Union Local No. 554* v. *NLRB*, 522 F.2d 562, 565-567 (8th Cir. 1975); *Douds* v. *Int'l Longshoremen's Ass'n*, *supra*, 241 F.2d at 281-283.

[35] *Local 13, Detroit Newspaper Printing Union* v. *NLRB*, 598 F.2d 267, 273 (D.C. Cir. 1979).

[36] Accordingly, the Board in this case (Pet. App. 47) respectfully disagreed with the view, stated by the Third Circuit in *NLRB* v. *Beck Engraving Co.*, *supra*, 522 F.2d at 483, that impasse is "an event which neither [side] can manipulate * * *."

[37] There is nothing inconsistent in applying economic pressure at the same time the parties are engaged in bargaining. See *NLRB* v. *Insurance Agents' Union*, *supra*, 361 U.S. at 479, 489, 490. Thus, employers may lock out and employees may strike before impasse is reached. *See Darling & Co.*, 171 N.L.R.B. 801, 802-803 (1968), aff'd *sub nom. Lane* v. *NLRB*, 418 F.2d 1208 (D.C. Cir. 1969); *NLRB* v. *Safeway Steel Scaffolds Co.*, 383 F.2d 273, 280 (5th Cir. 1967); *Callier's Custom Kitchens*, 243 N.L.R.B. No. 143, 102 L.R.R.M. 1008, 1009 (1979), enforced, 630 F.2d 595 (8th Cir. 1980).

tions—and in refraining from other actions—the parties rely upon the existence of the established multiemployer unit in weighing the costs and possible benefits of their conduct. The partial or complete destruction of that unit by unlimited unilateral withdrawals at or during impasse would not only tend to unsettle any tentative agreements or mutually dependent compromises that may have been reached in prior bargaining, but also would be unfair to the other parties who had applied or withstood economic pressure in support of the unit-wide bargaining demands.[38] Further, since both employers and unions plan their bargaining strategy on the basis of their estimates of the sources and extent of employee support in the unit, allowing unlimited unilateral withdrawals at or during impasse would unfairly deny the parties a predictable basis for calculating the union's continued majority support in the unit.[39]

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[38] For example, here the other members of the Association responded to the Union's strike against petitioner by a lockout (Pet. App. 57; A. 94).

[39] Amicus Curiae Graphic Arts Union Employers of America notes (Br. 12-13) that the Board will permit a union's representative status to be challenged after a contract has expired and, if such challenge is made, will permit a unilateral suspension of bargaining negotiations until the matter is resolved. It contends that this is more destructive of collective bargaining than is a rule which would permit an employer to withdraw from a multiemployer unit after an impasse has been reached in the negotiations, for the latter rule merely seeks an alternative method of bargaining (*i.e.*, in a single employer, rather than a multiemployer, unit), not its total suspension. "This is to make situations that are different appear the same" (*Brooks* v. *NLRB*, 348 U.S. 96, 104 (1954)). Where the union's status as the representative of the bargaining unit employees is properly called into question, it effectuates the policies of the Act to defer negotiations until that issue is resolved, because there would be no duty to bargain if the union in fact has lost the support of a majority of unit employees. On the other hand, where there is no valid reason to doubt that the union continues to represent a majority of the employees in a multiemployer unit, the only justification for permitting withdrawal is to afford an employer who wishes to leave the multiemployer unit,

For all these reasons, the Board is amply warranted in concluding that a bargaining impasse is not an unusual circumstance which would justify withdrawal from a multiemployer bargaining unit. It "is but one thread in the complex tapestry of collective bargaining rather than a bolt of a different hue." *Hi-Way Billboards, Inc., supra*, 206 N.L.R.B. at 23.

C. The Fact That a Union May Enter Into Interim Agreements With Individual Employers During a Strike Does Not Warrant a Rule Permitting Employers Unilaterally to Withdraw at Impasse

Although petitioner urges acceptance of the "impasse doctrine" to justify its unilateral withdrawal from the multiemployer unit, petitioner's arguments (Br. 14-15, 26-35), like those in the judicial decisions on which it relies,[40] focus not on the nature of impasse or its place in the collective bargaining process but on the alleged unfairness of the Board's rules. That is, petitioner contends that, since the Board permits the union to enter into separate "interim agreements" with some of the employer members of a multiemployer unit, which allow them to resume operations while a strike continues against the other members and pending the negotiation of a final agreement covering the multiemployer unit,[41] it is unfair

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and bargain on an individual basis, full freedom to do so. The Board could reasonably conclude that to afford the individual employer this freedom after negotiations have commenced and merely because they have reached an impasse, would be unduly destructive of the congressional objective of fostering collective bargaining through multiemployer units.

[40] *NLRB* v. *Hi-Way Billboards, Inc.*, 500 F.2d 181 (5th Cir. 1974); *NLRB* v. *Associated Shower Door Co.*, 512 F.2d 230 (9th Cir.), cert. denied, 423 U.S. 893 (1975); *NLRB* v. *Independent Ass'n of Steel Fabricators*, 582 F.2d 135 (2d Cir. 1978), cert. denied, 439 U.S. 1130 (1979); *NLRB* v. *Beck Engraving Co.*, 522 F.2d 475 (3d Cir. 1975).

[41] See *Sangamo Construction Co.*, 188 N.L.R.B. 159 (1971); *Plumbers & Steamfitters Union No. 323 (P.H.C. Mechanical Contractors)*, 191 N.L.R.B. 592, 596 (1971).

not to permit an employer unilaterally to withdraw from the unit after an impasse in the negotiations is reached.

In the present case, the Board found (Pet. App. 51), and the court below agreed (Pet. App. 33), that "no interim agreements were made or even attempted." But, in *Beck*, *supra*, the Third Circuit was of the view that the mere *possibility* that a union might enter into interim agreements would give it "a tremendous bargaining advantage and leverage" (522 F.2d at 483) that should be equalized by a rule permitting employers to withdraw from a multiemployer unit at any time during a bargaining impasse.[42] In light of *Beck*, the court below found it necessary to address the interim agreements question (Pet. App. 33-36; but cf. Pet. App. 37 (concurring opinion)). Having done so, it correctly concluded that interim agreements of the sort the Board has approved are a legitimate form of economic pressure, and that the Board therefore properly declines to disapprove them, either directly by finding them to be unfair labor practices or indirectly by withholding otherwise available unfair labor practice remedies against employers who untimely withdraw from multiemployer bargaining.

The *Beck* court found interim agreements objectionable on the ground that they enabled the union to "whipsaw the remaining employers of the bargaining unit," thereby "strengthen[ing] the union's hand vis-a-vis those employers who continue to bargain within the unit" (522 F.2d at 482-483). The court further stated that negotiating such agreements "is tantamount to a rejection of the

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[42] As the court below correctly observed (Pet. App. 27-29, 33), the absence of any interim agreements here serves to distinguish the other cases relied on by petitioner—*Hi-Way Billboards*, *Associated Shower Door*, and *Independent Ass'n of Steel Fabricators*—since in all of those cases the courts relied in whole or significant part on the fact that the union objecting to the untimely withdrawal of certain employers had itself entered into separate agreements with individual members of the employer association. See also Murphy, *Impasse and the Duty to Bargain in Good Faith*, 39 U. Pitt. L. Rev. 1, 55, 60 (1977).

existence of the multi-employer bargaining unit" and that the Board's approval of this additional weapon in the union's arsenal required that the employer be granted "an equivalent right" of unilateral withdrawal from the unit (*id.* at 483). Accordingly, the court held that "[t]he rights of the parties should accrue simultaneously based upon the occurrence of an event which neither can manipulate (e.g., impasse)" (*ibid.*). This reasoning does not withstand analysis.

Initially, as the court below held (Pet. App. 34), even if some right of withdrawal were necessary to counterbalance the union's ability to negotiate interim agreements, there would be little reason to link it to the existence of an impasse. As shown (*supra*, pages 24-25), it is not true, as *Beck* assumed, that impasse is an event neither side can manipulate. Moreover, because employers may lock employees out and employees may strike prior to impasse (*supra*, note 37), interim settlements of these economic conflicts are often reached prior to impasse. The Board's approval of interim agreements has accordingly not been limited to situations where those agreements were entered into after impasse.[43] For the reasons discussed above, neither party's right to withdraw from the unit should be based on the existence of an impasse.

In any event, interim agreements of the kind the Board has approved are not the equivalent of unilateral withdrawal from a multiemployer unit. As the Board emphasized here (Pet. App. 47-48), it has approved interim agreements only in situations where employees work dur-

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[43] *Callier's Custom Kitchens, supra*, 243 N.L.R.B. No. 143, 102 L.R.R.M. at 1010 n.6, 1011-1012, noting that interim agreements of the sort executed by the union "serve the necessary and useful purpose of encouraging movement and compromise and, thus, avoiding deadlocks in negotiations"; *Sangamo Construction Co., supra*, 188 N.L.R.B. at 160, dismissing unfair labor practice charges directed at an interim agreement, when bargaining continued throughout the period that the agreement was in operation.

ing the strike either under the terms of the expired contract (*Sangamo Construction Co., supra*), or under the terms that the union had previously offered to the employers' association and the association had rejected (*P.H.C. Mechanical Contractors, supra*). In either case, the parties mutually recognize that these terms are temporary, pending the outcome of the group bargaining, and that any contract reached in the multiemployer unit will ultimately govern all employer-employee relationships in that unit.[44] Such agreements are in sharp contrast to final separate agreements with members of the multiemployer unit. Indeed, where union efforts to negotiate such separate agreements have resulted in the fragmentation of the unit, the Board has excused untimely withdrawals from multiemployer groups. See *Connell Typesetting Co., supra*, 212 N.L.R.B. at 921; *Typograhic Service Co., supra*, 238 N.L.R.B. at 1565-1566. Compare *Tobey Fine Papers of Kansas City*, 245 N.L.R.B. No. 181, 102 L.R.R.M. 1343, 1344-1345 (1979), enforced on other grounds, 107 L.R.R.M. 2221 (8th Cir. 1981) (refusing to find fragmentation where the employers did not object to the separate agreements by filing unfair labor practice charges and did not rely on them in later withdrawing from the unit).

The Board has thus approved only interim agreements that respect the superior authority of the multiemployer association to negotiate a final contract controlling the relations of the unit employers and employees for the contract term. Because such agreements are avowedly subordinate to the unit-wide contract, they are not inconsistent with the commitment to be bound by group action

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[44] Petitioner inaccurately states that the conclusion of a separate interim agreement shows "an employer is breaking away from the group to bargain individually with the union" (Br. 33). See also Graphic Arts Br. 15-19. These agreements do not contain any special provisions worked out between the union and the individual employer, nor do they offer the agreeing employer any long term benefits not available to the other association members.

in bargaining. Moreover, unlike unilateral withdrawals or separate final agreements, such interim agreements do not change the boundaries of the unit, and, since the signers thereof know they will be bound by the results of group bargaining, they retain a vested interest in the outcome of the multiemployer negotiations.[45] Finally,

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[45] By contrast, separate final agreements breach the commitment to be bound by group action in bargaining upon which the multiemployer unit is founded and deny the authority of the employer association to bind each employer member to the final contract. If such separate final agreements were deemed lawful, then, under Section 8(d) of the Act, 29 U.S.C. 158(d), neither the union nor the individual employer would have a right to require the other to "terminate or modify such contract" during its term. Accordingly, to the extent that the separate contract was different from the one governing the multiemployer unit, that difference could endure for the contract's term, and a central purpose of multiemployer bargaining—"avoiding the competitive disadvantages resulting from nonuniform contractual terms" (*Buffalo Linen, supra*, 353 U.S. at 96)—would be frustrated.

Since separate final agreements do tend to undermine the multiemployer unit, the Board has held that an employer and a union violate, respectively, Sections 8(a)(5) and 8(b)(3) of the Act, 29 U.S.C. 158(a)(5) and 158(b)(3), if, without the consent of the multiemployer group, they enter into a separate final contract that is not intended to be superseded by the contract worked out in the multiemployer unit. *Teamsters Local 378 (Olympia Automobile Dealers Ass'n)*, 243 N.L.R.B. No. 138, 102 L.R.R.M. 1007 (1979), enforcement pending, No. 79-7683 (9th Cir., argued Nov. 5, 1980). As the Board explained in *Callier's Custom Kitchens, supra*, 243 N.L.R.B. No. 143, 102 L.R.R.M. at 1011 n.8:

> The essence of multiemployer bargaining is a consensual, tripartite relationship between the union, the multiemployer bargaining association, and the individual employer-members of the association. * * * Each essential party to multiemployer bargaining * * * has a stake not only in the results of multiemployer bargaining, but in the multiemployer unit's membership composition as well. Recognition of the nature of multiemployer bargaining and the relationship between the parties has prompted the Board to find that, once multiemployer bargaining has begun, the multiemployer association has the right to restrain an individual employer-member from

because interim agreements are a means whereby particularly vulnerable employers may avoid exceptional hardship during a strike,[46] they provide useful flexibility in multiemployer bargaining, and indeed may forestall situations where employers are forced to withdraw from the unit in order to survive economically (*supra*, page 20, note 24).

To be sure, interim agreements may create a whipsaw pressure on the remaining employers to agree to the union's demands within the unit. In this respect, they closely resemble a selective strike.[47] However, as the court below correctly observed, "the uneven application of economic pressure *per se* is not inconsistent with multiemployer bargaining (Pet. App. 33). Cf. *Buffalo Linen*, *supra*, 353 U.S. at 89-90, 94 n. 22. The whipsaw pressure on the remaining members of an employer association from interim agreements by some members is analytically no different from the pressure that results

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defecting from the multiemployer fold and proceeding to negotiate and enter into a separate, final agreement with the union.

On the basis of this analysis, the separate agreement reproduced at SA 4-6 of the Graphic Arts Brief might well be found to be a violation of Sections 8(a)(5) and 8(b)(3) to the extent that it preserves special benefits to the individual employer after the conclusion of the multiemployer agreements (see Graphic Arts Brief 15-16, 19-20).

[46] *E.g.*, *P.H.C. Mechanical Contractors*, *supra*, 191 N.L.R.B. at 593 (employer performing a contract with a time penalty clause for nonperformance at the time of the strike).

[47] They are indeed typically a means of implementing a selective strike. For example, the union may announce that it will strike all the employers in the unit who do not sign interim agreements embodying the terms of the union's final offer to the association, or it may announce its willingness to abandon an ongoing strike with respect to all employers who will sign such an interim agreement. See, *e.g.*, *Callier's Custom Kitchens*, *supra*, 243 N.L.R.B. No. 143, 102 L.R.R.M. at 1009; *Seattle Auto Glass*, 246 N.L.R.B. No. 21, 102 L.R.R.M. 1376, 1377 (1979), petition for review pending, No. 79-7603 (9th Cir., argued Nov. 5, 1980).

when some members refuse to join in a lockout in response to a selective strike.[48]

Finally, contrary to the Third Circuit's position in *Beck*, it is not invariably true that the individual agreement gives the union a forceful weapon against the employers who continue to bargain within the unit (522 F.2d at 483).[49] In any event, under a system of collective bargaining where the substantive terms of the employment relationship are resolved in accordance with the relative economic strength of the participants, *NLRB* v. *Insurance Agents' Union*, *supra*, 361 U.S. at 488-490, 495, both sides, absent proof of unlawful motivation, have great leeway in exerting concurrent economic pressures on each other. The "Board's statutory mandate is to balance, not economic weapons, but 'conflicting legiti-

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[48] As the court below added (Pet. App. 33 n.18), just as these employers who refuse to join a lockout and thereby remain in operation "could prevent any whipsaw by engaging in the lockout," employers who sign interim agreements could avoid a whipsaw "by refusing to negotiate such agreements." Petitioner's assumption that the interim agreement is a weapon solely within the control of the union is therefore incorrect (Br. 26-27; cf. Graphic Arts Br. 15).

[49] The potency of the interim agreement, like that of any other economic weapon, will vary with the circumstances. Doubtless a union will often hope that the uneven economic pressure on the association that can result from such agreements will lead to a quick capitulation to its demands, and, when the association is divided and unwilling to lock out or endure a strike, this may be the result. On the other hand, when the employer association is strongly united, the signing of an interim agreement may have no impact whatsoever on the association's determination to resist the union's demands (see *P.H.C. Mechanical Contractors*, *supra*, 191 N.L.R.B. at 592-594), and the eventual contract settlement may be on terms more favorable to the employers than the interim agreements, requiring the union to give up its temporary gains (see *Associated Shower Door Co.*, 205 N.L.R.B. 677, 679-680 (1973), enforced on other grounds, 512 F.2d 230 (9th Cir.), cert. denied, 423 U.S. 893 (1975)).

mate interests'" (Pet. App. 50).[50] The Board has reasonably balanced those interests in distinguishing between separate interim agreements and separate final agreements. As the Fifth Circuit concluded, after reconsidering its *Hi-Way Billboards* decision (*NLRB* v. *Marine Machine Works, Inc., supra*, 635 F.2d at 525-526 (footnote omitted)):

> [T]he Board has wisely weighed the competing policy concerns. The Board's rules balance an individual party's legitimate interest in striking its own separate bargain against the parties' and the public's legitimate interest in achieving the benefits afforded by continued multiemployer bargaining, including avoiding the industrial strife likely to result from frustration of the bargaining process. In reaching this balance, the Board is treating both unions and employers equally and fairly. The Board permits each to use all available economic weapons in aid of reaching an overall settlement. On the other hand, the Board prohibits each from taking action that is destructive of the multiemployer unit: unions may not seek to negotiate separate permanent agreements with employers, and employers may not withdraw from the unit and seek separate permanent negotiations with the union. This result is well within the Board's broad discretion to resolve the inevitable questions arising in the multiemployer bargaining context.

In sum, the Board's conclusion that an employer may not unilaterally withdraw from a multiemployer unit solely because of an impasse in negotiations with the bargaining representative of the unit employees is a reasoned application of the policies of the Act (see *Beth*

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[50] For these reasons, the Board (Pet. App. 50-51), in assessing the propriety of interim agreements, correctly dissociated itself from the weapon-counting approach of the *Beck* court ("[t]he union * * * should not have been given two weapons for its economic arsenal (*i.e.*, the selective strike and individual negotiations) while the employers are given only one (viz., the lockout)," 522 F.2d at 483).

Israel Hospital v. *NLRB*, 437 U.S. 483, 499 (1978); *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979)) in an area that Congress "intended to leave to the Board's specialized judgment" (*Buffalo Linen, supra*, 353 U.S. at 96), and therefore is entitled to acceptance.[51] The court below thus properly sustained the Board's finding that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to execute the collective bargaining agreement reached between the Union and the Association.

CONCLUSION

For the foregoing reasons, the judgment of the court below enforcing the Board's order should be affirmed.

Respectfully submitted.

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[51] The need for expert judgment in this area is emphasized by the fact that both petitioner and the unions claim that the adoption of the particular position they espouse is necessary to preserve the viability of multiemployer bargaining. Compare Pet. Br. 9, 15, 26 with Teamsters Br. 6-7, 10-12 and United Mine Workers Br. 11-13.

APPENDIX

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are as follows:

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce * * * (B) an employer in the selection of his representatives for

the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or selfemployed person to join any labor or employer organization * * *

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

SEC. 10. (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

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